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Evidence

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EVIDENCE

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HEARSAY

Watson v. Wall[1] was an action for partition of a tract of land, brought by the administrator c.t.a. of the estate of S. J. Wall. The executrix of the estate of W. Furman Wall, the brother of S. J. Wall, was permitted to intervene as a defendant. The intervenor took the position that Furman had conveyed his one-sixth interest in the tract to S. J. Wall while Furman was mentally incompetent, and that the deed had been obtained by fraud and for a grossly inadequate consideration. The answer prayed that the deed be set aside upon tender of the purchase price. A special referee found for the intervenor-defendant, but the circuit judge held that the evidence was insufficient to establish fraud or undue influence and dismissed the claim. The Supreme Court affirmed. On appeal, the intervenor objected inter alia to the admission in evidence of a statement of a since-deceased doctor to the effect that Furman was mentally and physically capable of executing any legal papers. This statement had been sent to S. J. Wall by Furman, after a lengthy exchange of correspondence between the brothers, during which S. J. urged Furman not to sell, and Furman insisted that he needed the money for a business transaction. Finally, S. J. had written his brother, "If you still persist in selling your interest if you will get a statement from some reputable doctor that you are physically and mentally able to make a title to real estate, I will try and borrow the money and give you $600.00 for your part of the plantation."[2] Furman answered, enclosing the requested statement, from one Dr. Zimmerman.

Defendant objected to admission of this statement on the ground that the doctor (deceased at the time of trial) was not available for cross-examination. The special referee held it admissible. The Supreme Court found it doubtful that defendant had preserved this question for appeal, but found no error in the admission in evidence of the doctor's state-

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1. 239 S. C. 109, 121 S. E. 2d 427 (1961).
2. 239 S. C. 117, 121 S. E. 2d 431 (1961).

ment. No question of authenticity was raised; the only issue was that of hearsay. The Court held in effect that the statement was not hearsay on the issue of whether S. J. Wall's conduct in the transaction was fraudulent. This would appear clearly correct, since on this issue, the truth of the matter stated in the certificate would not be essential to its probative force. As to admissibility of the certificate on the other issue, whether Furman was in fact competent, the Court held that other evidence in the record clearly indicated that Furman Wall had sufficient capacity to understand the transaction, so that even if the certificate had been admitted for use in determining this issue, the error was harmless.

Admissions

State v. Davis[3] was an indictment of a white member of the Marine Corps for rape of a Negress. At the trial, one Sergeant Hartley, who had been on shore patrol duty on the night in question, testified that defendant had come running up to him and said that two colored boys were pursuing him. The colored boys then came running up, the Sergeant testified, and told him that defendant had "thrown a colored woman down in the bushes." Defendant then had flatly denied the charge. The Supreme Court held that admission of these statements was prejudicial error, and reversed a conviction, on this and other grounds. Since defendant had denied the charge, no basis for estoppel or admission by conduct arose, and the statements constituted inadmissible hearsay. In *State v. Sharpe*,[4] a conviction of a Negro for rape of a white woman, a similar question arose, in which, however, the requisites for admissibility as an admission were found to exist. While defendant was in jail, his mother came to him and said, "Israel, as many colored women as it is in this town why in the world did you go and get messed up with a white woman and you will just have to pay your penalty."[5] Defendant made no reply. Defendant objected to admission of this statement at the trial, alleging that he was not present when it was made. The record showed otherwise, and the Supreme Court held that the statement was properly admitted, since defendant heard it and remained silent.

3. 239 S. C. 280, 122 S. E. 2d 633 (1961).
4. 239 S. C. 258, 122 S. E. 2d 622 (1961).
5. 239 S. C. 271, 122 S. E. 2d 628 (1961).

Res Gestae—Contemporaneous Utterances

Van Boven v. F. W. Woolworth Co.[6] was an action for damages by a customer of the store, who alleged that she tripped and fell over a section of low wire fencing left in an aisle of the "garden shop" of defendant's store. After falling, the plaintiff hobbled back into the store and found an employee to whom she told her story and showed her torn hose. The employee called her supervisor, and said to the latter, ". . . . this is the lady that fell outside the flower bed where they had been working." The Supreme Court held that admission of this statement was proper, under the res gestae rule,[7] Mr. Justice Moss pointing out that the statement need not be precisely concurrent in point of time with the act, but that it was enough if the statement was contemporaneous with the main fact. The Court distinguished the *McLellan Stores* case,[8] in which testimony of a witness to the effect that five seconds after plaintiff's fall in that case, some unknown elderly lady had stated that "The floor has just been oiled and she fell," was held not within the res gestae rule.

McClure v. Price[9] involved a collision between an automobile and a tractor-trailer. A small barber shop was located at the small intersection where the accident occurred. A barber named McDowell was called as a witness for the defense, and testified that he had been looking out of the window and saw the collision. He testified that a fellow barber, one Thomas, had seen the plaintiff's car approaching the intersection, and had exclaimed, "The dern fool is going to kill himself." Upon objection, the trial judge excluded this statement, and directed the jury to disregard it. Defendants contended that it was admissible as res gestae. The Fourth Circuit Court of Appeals, upheld exclusion on the ground that Thomas had been called as a witness for defense, and at no time did he say that he saw the plaintiff's car before the collision. The Court does not set out its reasoning, and may have felt that no prejudice arose from exclusion. It would seem that if counsel considered the point important,

6. 239 S. C. 519, 123 S. E. 2d 862 (1962).
7. This rule embraces a broad range of hearsay exceptions, including declarations of present bodily condition, declarations of present mental state or emotion, excited utterances and declarations of present sense impressions. Wabisky v. D. C. Transit System, Inc., 309 F. 2d 317 (D. C. Cir. 1962); McCORMICK ON EVIDENCE, §§ 265-274 (1954).
8. Bagwell v. McLellan Stores Co., 216 S. C. 207, 57 S. E. 2d 257 (1949).
9. 300 F. 2d 538 (4 Cir. 1962).

he would have questioned Thomas specifically thereon, refreshing his recollection if necessary, and perhaps even laying a foundation for admission of the statement as impeachment of his own witness.[10] However, as a matter of principle, the statement would seem clearly to qualify within the res gestae rule, and the fact that the declarant Thomas did not so testify at the trial would not seem to affect the result; a party is free to introduce testimony which contradicts that of his own witness.[11]

Official Records

Edwards v. Edwards[12] was an action by plaintiff seeking to have himself declared the natural child of William S. Edwards, and therefore an heir of James M. Edwards. At the trial, at which plaintiff received a verdict and judgment in his favor, the trial court admitted into evidence information relevant to plaintiff's parentage, and contained in the U. S. Official Census returns for 1920. Plaintiff introduced a certificate[13] stating that in that return, the names of Will Edwards and his wife, as husband and wife, and Waites Edwards, the plaintiff, and 3 other sons, were set out. The census listed the children all as "sons." Defendants in the instant case included the other listed sons, and introduction of the report into evidence was opposed on the ground that it would violate the pertinent Federal statute.[14] The Court pointed out that the principal probative use of the information at the trial would be to establish the relation of plaintiff to Will Edwards, and that the relationship of the other children was undisputed and not before the Court. The Court held that the word "detriment" in the statute did not mean detriment in the sense of a financial loss flowing from establishing the truth in court, and that defendants suffered no detriment within the contemplation of the Act.

CONFESSIONS

The formal requirements for admission into evidence of a confession are outlined by Mr. Justice Moss in *State v.*

10. Presumably counsel would have to show surprise from the unexpected testimony of his own witness to do this. MCCORMICK ON EVIDENCE, § 38, pp. 72-73 (1954), and cases cited.
11. MCCORMICK ON EVIDENCE, § 47 (1954). Clearly, the testimony is on a material, not a collateral, fact in the instant case.
12. 239 S. C. 85, 121 S. E. 2d 432 (1961).
13. Pursuant to 13 U. S. C. A. § 8(a).
14. 13 U. S. C. A. § 8(c) provides: "In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates."

Worthy.[15] Defendant claimed that his confession was not voluntarily made and was made while he was intoxicated. Since the record contained ample evidence that this was not so, and since defendant offered no evidence at the trial to controvert the evidence offered by the solicitor, the Court held that admission of the confession was proper in the circumstances, although the conviction was reversed on other grounds. In *State v. Young*,[16] the Supreme Court held that questions relating to the circumstances surrounding the taking of a confession were proper in connection with its admission into evidence, and that the fact that the confession was taken down by a person apparently not experienced in such matters, so that the words of the arresting officer and the answers thereto by the defendant were not separated, caused no confusion or prejudice in the circumstances. The confession was held properly admitted in evidence, in an opinion by the Chief Justice.

In *State v. Robinson*[17] the trial judge conducted the preliminary examination as to the voluntariness of an alleged confession of defendant, in the presence of the jury, a practice which the Supreme Court has often criticized. The Court's view of what constitutes the better practice, as set out in the *Chasteen* case,[18] was particularly vindicated in the instant case, where after strenuous objection by defendant the solicitor withdrew the offered confession, and the trial judge instructed the jury to "wipe it from your minds." However, the Supreme Court found that other evidence of defendant's guilt was almost overwhelming, and that counsel for defendant had not objected to conducting the preliminary examination in the presence of the jury. On these considerations, the Court refused to reverse the conviction.

BURDEN OF PROOF AND PRESUMPTIONS

Burden of Persuasion—"Clear and Convincing Evidence."

In *Watson v. Wall*[19] the intervening defendant asserted that decedent W. Furman Wall had transferred his interest in the land while mentally incompetent, and that the deed had been obtained by fraud, duress and undue influence. Hence, he

15. 239 S. C. 449, 123 S. E. 2d 835 (1962).
16. 238 S. C. 115, 119 S. E. 2d 504 (1961).
17. 238 S. C. 140, 121 S. E. 2d 432 (1961).
18. 228 S. C. 88, 88 S. E. 2d 880 (1955).
19. *Supra* note 1.

assumed the burden of proving this allegation by "clear, cogent and convincing evidence."[20] The special referee found that the defendant had carried this burden, and recommended that the deed be set aside. The case then came to the circuit judge, who disagreed with the conclusion of the special referee, and held that the evidence was insufficient to establish fraud or undue influence. No indication is given in the report of the case as to what standard of persuasion was applied by the circuit judge, nor as to what standard would be proper. On appeal, the Supreme Court stated that since the issues were equitable, "the lower court's factual findings are subject to review on appeal, and may be reversed if in our opinion they are contrary to the preponderance of the evidence," citing *Simonds v. Simonds*,[21] with the burden of convincing the appellate court resting on the appellant. Thus South Carolina seems committed to the orthodox view that the test to be applied by the appellate court in these cases in which the burden below is by "clear, cogent and convincing evidence" is simply the preponderance of the evidence test. Dean McCormick discusses the two views, without taking sides as to which is the better.[22]

Burden of Producing Evidence and Presumptions

Packer v. Corbett Canning Co.[23] was a workmen's compensation case. The employee was found dead at about 7 a.m. at his employer's place of business, his duties requiring his presence as night watchman from 9:30 p.m. to 6 a.m. There had been a severe electrical storm the night before. The body was found lying with the lower portion in water; in the same puddle approximately six feet from the body was an electric cord, attached to a sump pump used to fill the boiler. There was no switch on the pump; the pump was started by plugging the cord into the electric socket, and stopped by removing the plug. The claimant's theory, based on the position of the body relative to the cord, was that the decedent had died from electrocution in pulling out the cord, thus making the death the result of employment. Defendant

20. MCCORMICK ON EVIDENCE, § 320 (1954).
21. 232 S. C. 185, 101 S. E. 2d 494 (1957).
22. MCCORMICK ON EVIDENCE, § 320, p. 681 (1954).
23. 238 S. C. 431, 120 S. E. 2d 398 (1961).

claimed that death resulted from a coronary from a pre-existing heart condition. This type of case, often involving night watchmen or police, presents a particularly difficult problem of proof both for claimant and defense, since there are seldom any eye-witnesses, the after-discovered facts are sparse, and recreation of the event involves hypotheses and imagination. Under South Carolina law, the burden is on the claimant to produce evidence as will render the claim compensable, and a decision cannot rest upon "surmise, conjecture or speculation." Courts frequently hold that evidence such as that indicated above is insufficient to justify a finding in the proponent's favor, and a finding of fact based thereon must be set aside as pure speculation.[24] However, claimant herein relied further on the "natural presumption, or . . . . presumption of fact, that one charged with the performance of a duty, and injured while performing such duty, or found injured where his duty required him to be, is injured in the course of, and as a consequence of, his employment." If the basic facts giving rise to the presumption are found to exist, then the presumption arises, and at least takes the case to the trier of fact.[25] The Supreme Court held, per the Chief Justice, that the presumption could not be used to establish the incidence of the accident in the instant case, and affirmed the trial court's reversal of the order for compensation rendered by the Industrial Commission. It would seem that the holding of the Court is that the basic facts were not sufficient to establish the presumption, since no evidence was available to indicate that the claimant died of electrocution, other than the position of the cord. Support for this interpretation of the opinion is found in the emphasis placed by Chief Justice Taylor on the fact that the deceased had no duty in any wise connected with the operation of the sump pump; someone else had that duty. Nor was there any evidence that the loose cord had been plugged into the socket.

24. Judicial struggles with this problem are indicated in four cases collected or cited in Dean McCormick's casebook, CASES AND MATERIALS ON THE LAW OF EVIDENCE, pp. 597-599 (1956). The cases are Burens v. Industrial Comm. of Ohio, 162 Ohio St. 549, 124 N. E. 2d 724 (1955); Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N. E. 2d 754 (1945); Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35 (1944); and Evans & Co. v. Astley, [1911] A. C. 674, 678, opinion of Earl Loreburn. L. C.

25. MCCORMICK ON EVIDENCE, § 310 (1954); Battey, *Some Problems of Presumptions: The South Carolina Treatment*, 14 S. C. L. Q. 538, 543-551 (1962).

Burden of Persuasion—Criminal Cases

In *State v. Young*,[26] defendant claimed error in the instructions to the jury in that the jury might have been led to believe that the burden of proof could shift to the defendant. The portion of the charge objected to stated:[26a]

> The burden of proof is upon the State to prove the guilt and it does not shift to this defendant in this case except upon any testimony which may relate to the defense of insanity and then the burden shifts to him to prove by the greater weight or preponderance of the evidence the fact of insanity because that rests upon the defendant.

The Supreme Court held this charge to be free from error, especially since the trial judge on nine occasions made reference to the requirement that the State must prove the guilt of the accused beyond a reasonable doubt, before defendant could be convicted as charged. The instruction as to the shifting of the burden clearly related only to the issue of insanity, as to which issue such instruction was proper.

Presumptions

In *Mungo v. Bennett*,[27] the Court applied the rule that no presumption exists that all domestic animals are dangerous. Hence, a plaintiff claiming damages for being kicked by defendant's horse must prove that defendant had reason to know that the animal was dangerous.

BEST EVIDENCE RULE

In *State v. Worthy*[28] the confessions made by the defendant were recorded at the time on electric recording devices. At the trial, the confessions were admitted through the oral testimony of officers present at the time of taking. The defendant objected on appeal that the oral testimony was not the "best evidence," and that the recorded confessions must be offered or their absence excused. The Supreme Court held the oral testimony admissible, Mr. Justice Moss saying:[29]

> It was competent to prove the confessions by the oral testimony of the officers who heard such, even though

26. Supra note 16.
26a. 238 S. C. 137, 119 S. E. 2d 516 (1961).
27. 238 S. C. 79, 119 S. E. 2d 522 (1961).
28. Supra note 15.
29. 239 S. C. 462, 123 S. E. 2d 841-842 (1962).

> a recording thereof was made. In this connection, we should point out that the tape recordings of the confessions of the appellant had been made available to his counsel. There is no showing that the contents of the recordings were any different from the oral testimony of the officers who heard the confessions. If there was a difference, the recordings could have been used for the purpose of impeaching these witnesses.

The Court approves the view adopted in some jurisdictions that the recording or the oral testimony relating to the statements made are equally competent primary evidence. Thus presumably had the recordings been destroyed, the oral testimony would have been admissible. This is in accord with the view of Dean McCormick in regard to analagous situations, when he says:[30]

> In other words, the transactions described are not regarded by the law as essentially *written* transactions, as are written contracts, deeds, and judgments. Where this is so, testimony descriptive of such oral transactions is not within the scope of the present rule [the Best Evidence rule], and it may be given without the use or production of the written memorandum.

The question might arise where the original tape recording has been reduced to typewritten copy; in this situation, Professor Conrad has concluded that the only safe course for counsel is to preserve both the tape recording and the typed transcript thereof, and to offer both in evidence.[31]

OPINION EVIDENCE

In *State v. Sharpe*[32] defendant was charged with assault with intent to ravish. Prior to trial, he moved for an order to have himself confined to the State Hospital for 30 days for examination and observation as to his sanity,[33] which motion was denied. At the trial, the solicitor introduced evidence of the sheriff and a deputy sheriff, and of the chief of police of the city, each of whom testified to the opinion that defendant knew the difference between right and wrong.

30. MCCORMICK ON EVIDENCE, § 198 (1954).
31. Edwin C. Conrad, *Magnetic Recordings in the Courts*, 40 VA. L. REV. 23, 28-36 (1954).
32. Supra note 4.
33. Pursuant to CODE OF LAWS OF SOUTH CAROLINA, § 32-966 (1952), and § 32-927, 1960 Supp.

A Dr. Keyserling had examined the defendant in the early hours of the morning after the alleged commission of the crime, and a portion of his written statement was read into the record.[34] This included statements that the defendant seemed a well oriented individual, did not appear intoxicated, and seemed perfectly capable of understanding the purpose of his examination. Defendant called as a witness a Dr. Morse, a general practitioner, who had never examined defendant and who testified in answer to a hypothetical question. He testified that he was not in a position to know whether defendant knew the difference between right and wrong. The Supreme Court held that the granting or denial of the motion to commit was within the sound discretion of the trial judge, and that no abuse of discretion appeared. The lay testimony as to sanity was held properly admissible. In *State v. Thorne*,[35] also a rape case, defendant was committed to the State Hospital before trial for 30 days examination, pursuant to the statute, and the examining physicians testified that in their opinion he was able to distinguish right from wrong. No testimony was presented that the defendant was insane or mentally defective.

In *McCarty v. Kendall Company*,[36] a workmen's compensation proceeding, the question was whether there existed a causal connection between the back injury of the employee and the later formation of a kidney stone. Defendant objected that a hypothetical question asked an expert physician, witness for the plaintiff, included facts not supported in the evidence. The Supreme Court noted that "[I]t is quite true that the probative value of expert testimony based upon hypothetical facts stands or falls with the existence of facts upon which it is predicated." But the Court found that there was evidence in the record to permit the finder of fact to find in accordance with the factual premise of the hypothetical question.

RELEVANCY

Demonstrative Evidence

Two questions relating to demonstrative evidence arose in the case of *Harper v. Bolton*.[37] Plaintiff suffered an injury

34. The opinion does not indicate whether an objection was made to this evidence on the ground that it was hearsay.
35. 239 S. C. 164, 121 S. E. 2d 623 (1961).
36. 238 S. C. 493, 120 S. E. 2d 860 (1961).
37. 239 S. C. 541, 124 S. E. 2d 54 (1962).

to her left eye, necessitating its removal, in the accident in which she was riding as a passenger in defendant's automobile. At the trial, the surgeon who removed the eye testified to the condition of the eye after the accident, the need to remove it, and the operation resulting in its removal. Counsel then asked, "Incidentally, do you happen to have the eye?"[38] The doctor handed counsel a small glass vial containing the removed eye, which counsel offered in evidence. Defendant objected that the eye was irrelevant, since it had already been established by the doctor's testimony that the eye had been removed. The trial court asked counsel to admit that the eye had been removed, and was apparently dissatisfied with counsel's statement of the admission,[39] and held the eye admissible. On appeal, the points were carefully briefed by counsel, and both the opinion of the Court by Mr. Justice Moss and the dissenting opinion by Mr. Justice Bussey are excellent in reasoning and analysis. The majority held that admission of the eye under the circumstances was prejudicial error, since the offer of evidence did not tend to shed any light upon any issue in the case, and was apparently designed merely to excite pity and commiseration. The Court found the admission of defense counsel as to the loss of the eye an unqualified admission. In dissent, Justice Bussey stressed that the pleadings of defendant demanded strict proof of the damages, that no objection was made until the eye was offered in evidence, and that the admission of counsel was qualified. Further, Justice Bussey argued that both on the issue of admission of the eye, and on the other issue discussed immediately below, appellant had the burden of showing that any error was prejudicial. Yet appellant did not claim that the verdict was excessive nor that it was unsupported by the testimony.

The majority and dissent agree on the basic approach to the problem. Demonstrative evidence is admissible only if it tends to prove some disputed or controverted issue in the

38. Transcript of Record, p. 12.

39. Part of the exchange between counsel and court as indicated in Transcript of Record, p. 13, was as follows:
"The Court: I will overrule the objection, unless Counsel —
"Mr. Dallis (for the plaintiff): I will withdraw it.
"The Court: Do you admit in open Court that the eye was removed?
"Mr. Nelson (for the defendant): From what the doctor has said, I don't think there can be any doubt about it.
"The Court: No, sir, I asked you if you admit that.
"Mr. Nelson: If the doctor testified to that, I do admit it.
"The Court: We will receive the eye in evidence."

case. Even then, it will be excluded where the prejudicial effect of the evidence is great and its probative value is slight. In the view of the majority of the Court, once the doctor testified that the eye had been removed, and especially since counsel made the concession that there was no question as to the eye's removal, the introduction into evidence of the eye had little probative value and considerable prejudicial possibility. The record on appeal is not clear as to whether plaintiff in any way demonstrated her injuries to the jury; if she had done so, then the argument that the eye itself was merely cumulative and possibly prejudicial evidence on the issue of the removal of the eye would be strengthened.

The other issue involved in the case arose from the use of the blackboard by counsel for plaintiff during his argument to the jury. He was permitted to endorse thereon his personal opinion as to the per diem value of the pain and suffering undergone by plaintiff. It would appear that the issue here is whether counsel can express in dollar amounts his opinion of the compensable value of pain and suffering; the use of the blackboard as an aid does not add anything to the problem. Presumably, if counsel can give his estimate of pain and suffering damages orally, he can do it using a blackboard. The majority held that damages for pain and suffering, being unliquidated and indeterminate, must rest in the sound discretion of the jury, subject to the ambit of the trial judge's control for excessiveness. The Court found that there was no evidence in the record to support counsel's estimates of per diem damages for pain and suffering. Justice Bussey, dissenting on this issue as well, argued that counsel could legitimately make reasoned inferences from the evidence, including his own judgment as to the amount of damage, in gross or in detail. The rule adopted by the majority, Justice Bussey argued, would substantially inhibit many counsel in adequately presenting their cases to the jury.

In the *Thorne* case[40] the solicitor offered in evidence during cross-examination of defendant's sister a photograph of defendant taken while he was posing stripped to the waist and flexing his muscles. The witness was asked, "Does that look like your brother about three years ago? A. Yeah."[41] Defendant objected on the ground that it was calculated to

40. Supra note 35.
41. 239 S. C. 167, 121 S. E. 2d 624 (1961).

inflame the jury, and that since defendant was present at the trial, whatever probative value the photograph might have was supplied by the jury's opportunity to observe the defendant. The Court admitted the photograph into evidence. The Supreme Court, per the Chief Justice, affirmed, noting that defendant had been in prison for two years in connection with his trial, and the evidence showed that he had lost weight during this time. The victim was a sixteen year old girl of approximately 95 pounds weight; the State wished to reveal that the defendant at the time of the alleged offense was a strongly developed young man weighing between 185 and 200 pounds. This weighing of probative value against possible prejudicial effect is also illustrated in the *Sharpe* case[42] in which a handkerchief with blood stains almost indiscernable to the naked eye was admitted in evidence. The testimony showed that the defendant had worn a handkerchief over his face when he came into the home of the prosecuting witness, and the State alleged that this was the handkerchief in question. The Court held that the evidence tended to corroborate the testimony of the prosecuting witness, and was not calculated to arouse the sympathies and prejudice of the jury.

Other Transactions or Occurrences

In *Davis*[43] the confession of defendant contained statements relative to independent offenses committed in Atlanta. The Court held that this portion of the confession should be deleted on the re-trial of the case, since intercourse was admitted, identity was not in issue, and the only issue was consent. Evidence disclosing a previous offense was held admissible within the *Lyle-*[44]*Molineux*[45] rule, in *State v. Sharpe.*[46] A police officer testified that the defendant told him that he went to the house:

> to get revenge on the woman that testified against him in a previous case that caused him to have to serve eight months on the Chain Gang . . . . He then saw that it was not the woman who had testified against him so I asked him well, Israel, why didn't you leave the

42. Supra note 4.
43. Supra note 3.
44. State v. Lyle, 125 S. C. 406, 118 S. E. 803 (1923).
45. People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901).
46. Supra note 4.

> house, and he said at that time it didn't make no difference, he said I was going to rape anybody that would have been there.[47]

Testimony was presented proving that the woman who had testified against him in the previous trial had formerly lived in the same house. The Court held this testimony within the *Lyle* exception as showing motive, intent and identity.

ADMISSION AND EXCLUSION

Preservation of Exceptions

In the *Worthy* case[48] no "best evidence" objection was made to the oral testimony regarding confessions offered by the State, but the Court considered the exception anyway, under its *"in favorem vitae"* rule in capital cases. Similarly in *Sharpe*[49] the Court considered many errors to which objection was not made at the trial. However, counsel for defendant in such a case cannot safely neglect to take appropriate objections to inadmissible or prejudicial testimony offered by the solicitor, hoping that the *in favorem vitae* rule will preserve all questions on appeal. *State v. Robinson*[50] indicates the limitations on the rule; in that case, the solicitor asked the deputy sheriff who had arrested the defendant if the defendant had tried to run at the time. The sheriff made a non-responsive answer which included the statement that defendant had said he was "going to the probation office." Defendant made no objection to this at the trial, but on appeal argued that this introduced inadmissible evidence that defendant had been convicted of another crime, unrelated to that before the court. The Supreme Court held that to constitute reversible error, the appellant had the burden of satisfying the Court that the admission of such testimony was prejudicial. The fact that counsel had made no objection gave some indication that he did not think the answer prejudicial to his client.

In *Garrett v. Mutual Benefit Life Ins. Co. of N. J.*[51] defendant requested a charge of the trial court, which was refused. His request was based on alleged improper argument of counsel for plaintiff earlier in the case. No timely objection had been made to such argument, nor was the nature of the

47. 239 S. C. 272, 122 S. E. 2d 629 (1961).
48. Supra note 15.
49. Supra note 4.
50. Supra note 17.
51. 239 S. C. 574, 124 S. E. 2d 36 (1962).

argument set out in the record of the case. Because of the failure to preserve the question in the record, the Supreme Court held that it could not be considered on appeal.

Multiple Admissibility

Frequently in a lawsuit evidence is offered which is relevant to two or more issues in the case, and which is unobjectionable if it had been offered only on one of these issues, but is incompetent if offered on the other.[52] The usual solution of this problem is to admit the evidence, instructing the jury that it is admitted only on the issue on which it is competent, and should not be considered by them on the other issue. Thus in *South Carolina Electric & Gas Co. v. Aetna Ins. Co.*[53] the trial court held inadmissible a letter and memorandum relating to the insurance policy which the electric company had with Lloyd's of London. The action at bar concerned another policy which the electric company had with Aetna. The electric company had already collected on its Lloyd's policy for the same loss. There was also offered in evidence, however, the Lloyd's policy itself and the loan receipt given in connection with Lloyd's payment to the electric company under that policy. The trial judge ruled that the policy and loan receipt were admissible against the electric company on the issue whether there had been an "ensuing fire" within the terms of the Aetna policy, but not admissible on whether there was liability between Lloyd's and the electric company. The issue of "ensuing fire" was an issue in the case, and the Court viewed the policy and receipt as admissions on this issue; the issue of liability between Lloyd's and the electric company was foreign to the instant case. Since the electric company was not appealing, the question of the propriety of admitting the policy and receipt was not raised on appeal, but presumably, with the limiting instruction as given, the admission was correct.

Matthews v. Porter[54] involved two automobile accidents in succession. At both times, defendant's wife was with him when his car was hit, yet the defendant did not call his wife as a witness. This would raise the permissible inference that

52. Watson v. Wall, supra note 1, is an application of this doctrine in addition to the cases discussed herein. Generally, see MCCORMICK ON EVIDENCE, § 59 (1954).
53. 238 S. C. 248, 120 S. E. 2d 111 (1961).
54. 239 S. C. 620, 124 S. E. 2d 321 (1962).

his wife's testimony would be damaging to his case;[55] hence to explain his wife's absence as a witness, defendant testified that she was asleep when the first collision occurred, and lying across the seat of the car being attended by a doctor at the time of the second collision. On cross-examination, counsel for plaintiff asked if the wife had not made a claim against the defendant for her injuries. The trial court after discussion out of the presence of the jury permitted counsel to ask this question, over the objection of the defendant that this created an inference that the defendant was insured. The court specifically ruled that while this question could be asked, counsel could not question with reference to insurance. The Supreme Court held that the question was proper as tending to show another reason for the absence of the wife than the reason given by the defendant, and stated that it did not think that the testimony created an inference that the defendant had liability insurance. The question would seem proper under the usual rule of multiple admissibility even if it did create such an inference, with the defendant being entitled to a restrictive instruction to the effect that the jury could use the testimony only in rebuttal of the explanation of the wife's absence as a witness.[56]

MISCELLANEOUS

Improper Argument

In *State v. Davis*[57] defendant, a white member of the United States Marine Corps, was charged with the rape of a Negro woman. At the same term of court, a Negro man was charged with the rape of a white woman.[58] Defendant Davis was tried on the opening day of the term, the Negro, Sharpe, on the second day. Both were found guilty and sentenced to death. In his closing argument to the jury in the trial of defendant, the solicitor made the following argument:[59]

> I have one or more similar cases to the one being tried, to be brought up later in this court, and if you turn this defendant loose you might as well be turning these other defendants loose also, because if you turn this man loose I'm going to turn the others loose.

55. MCCORMICK ON EVIDENCE, § 249 (1954).
56. MCCORMICK ON EVIDENCE, § 168 (1954).
57. Supra note 3.
58. State v. Sharpe, supra note 4.
59. 239 S. C. 283, 122 S. E. 2d 635 (1961).

Both trials had received widespread newspaper treatment, and there was wide public interest therein. Defendant's counsel did not move for a mistrial, but did make an objection to "this line of talk," and the trial judge admonished the jury to try the case on the evidence adduced, and that no other case had anything to do with this case. The Supreme Court expressed doubt that "the evil influence upon the jury of the solicitor's argument was dispelled by so weak a protest and by such mild judicial action."[60] The Court reversed the conviction.

Leading Questions

Objection was made on appeal to many leading questions asked the prosecuting witness in the *Davis* case.[61] Timely objection had not been made thereto, but the Supreme Court considered the question nonetheless. However, the Court indicated that the failure of counsel to object at the time suggested that he did not think the questions prejudicial to his client. Furthermore, the Court suggested, permitting such questions was largely within the discretion of the trial judge, and that the witness was "ignorant, illiterate, and under nervous strain."[62]

Sequestration of Witnesses

In *Sharpe*,[63] the trial judge granted the motion of defendant to sequestrate all witnesses, save the sheriff, who was permitted to remain in the courtroom for the purpose of assisting the solicitor. The Supreme Court noted that sequestration was largely within the discretion of the trial judge, and that he had authority to exempt particular witnesses from the operation of the order of sequestration.[64]

Order of Proof

In *Turner v. Pilot Life Insurance Company*[65] the theory of the plaintiff was that the death of deceased was accidental; the insurance company claimed deceased had committed suicide. Defendant offered evidence in proof of the defense of suicide, to show that deceased was in bad financial condition, was hard put to pay the premiums on his policies, carried more insurance than a man in his financial condition would

60. 239 S. C. 284, 122 S. E. 2d 635 (1961).
61. Supra note 3.
62. MCCORMICK ON EVIDENCE, § 6, note 9.
63. Supra note 4.
64. 239 S. C. 285, 122 S. E. 2d 636 (1961).
65. 238 S. C. 387, 120 S. E. 2d 222 (1961).

normally carry, was short in his accounts as treasurer of his union, and was well versed in handling firearms. The trial court held this evidence inadmissible until defendant proved some circumstances surrounding the death to indicate the possibility of suicide. The Supreme Court affirmed, holding that the offered evidence of motive would not alone suffice to warrant submission of the issue of suicide to the jury. Hence the trial judge was within his discretion in controlling the order of proof to refuse to admit the testimony until a foundation had been established.

Prejudice in Instructions to Jury

In *State v. Young*[66] defendant was tried and convicted of murder. He contended that another person was present and actually struck the fatal blow. The trial judge charged that "all persons who are present, concurring and participating by some overt act in any crime are principals therein," and continued:[67]

> One who is present, helping, aiding and abetting another or others in the execution of an agreement between them with a common purpose to commit a crime would be responsible for the act of any one of the party provided that such act was done pursuant and incidental to such common purpose. Just to illustrate, gentlemen, I happened to be looking last night at a comedy on television where the Kingfish and Andy, I believe, were trying to get out of the telephone slot an old nickel. Well, I believe, the Kingfish was outside the telephone booth and Andy was inside the telephone booth. The Kingfish was watching, the other was trying to get the nickel out. Well, the mere fact that the one on the outside was not inside would make no difference in their degree of guilt because in such an instance the act of one would be the act of both if it was in the minds of both when they went there to get the nickel. So that's what the law means by saying that when two or more parties are engaged in the commission of a crime, the one watches, the other shoots, the law says it makes no difference who fired the fatal shot.

The Supreme Court held that in the circumstances, where defendant himself asserted that another person was present and

66. Supra note 16.
67. 238 S. C. 127, 119 S. E. 2d 510 (1961).

struck the fatal blow, the comment was not prejudicial and did not amount to an improper comment on the evidence.[68]

Judicial Notice

Acting Associate Justice Steve C. Griffith speaking for the Supreme Court found himself dissenting from the views of the Supreme Court of Kentucky as to what constitutes common knowledge and experience of the characteristics of horses and mules and the methods of working such animals, in *Mungo v. Bennett.*[69] Plaintiff, a neighbor of defendant, had been called to defendant's back yard, where he found defendant currying his horse. Plaintiff's evidence showed that defendant knew that the horse had on previous occasions been vicious, and had not warned plaintiff of such trait. While plaintiff was standing about five feet from the right front shoulder of the animal, it whirled around suddenly and kicked him. Defendant claimed that the plaintiff should be found contributorily negligent as a matter of law, based on common knowledge of the propensity of such animals to kick. The Court refused to so hold, distinguishing cases holding that walking directly behind the heels of the animal constituted contributory negligence, since in the instant case, plaintiff was not behind the animal at all. However, Justice Griffith disagreed with the view of those cases which stated that domestic animals were likely as a matter of common knowledge to kick at any time. He stated his experience that a properly trained animal does not kick, and that as a matter of common knowledge, you cannot work such an animal without going within radius of his heels.

In *Jumper v. Goodwin*[70] the Court stated that it is common knowledge that in open country where the speed limit is 55 miles per hour, there are many unmarked, small dirt roads intersecting with the improved highways.

68. Brief of Appellant-Defendant argued, pp. 12-13: "So closely does the illustration conform to the facts in this case, insofar as the larceny is concerned, the charge was therefore, at one and the same time, a charge on the facts and an opinion by the Trial Judge, that regardless of defendant's plea of not having actually killed anyone, he was automatically guilty of that offense. Thus, also, by charging as he did 'the law says it makes no difference who fired the shot,' the Trial Judge was not only giving his opinion as to the defendant's testimony, but was to all practical purposes directing a verdict of 'guilty of murder.' . . . .

". . . . The defendant, under the most favorable consideration of the facts stood literally between 'Life and Death.' This serious aspect, it is submitted, was wrecked by holding up, as a guide and standard by which his testimony, his chief defense, was to be gauged, a comic situation . . . ."

69. Supra note 27.

70. 239 S. C. 508, 123 S. E. 2d 857 (1962).

"Bound By Own Witness"

In *Rakestraw v. Allstate Insurance Company*[71] an insurance policy issued by defendant provided for payment of medical expenses to any person who sustained bodily injury caused by accident while occupying the insured's automobile "with the permission of the owner." Defendant denied that permission had been given by the insured to the plaintiff. It appeared that the car had been left with the owner of a filling station solely for purpose of sale by him. Plaintiff obtained the car from the filling station owner in order to paint it. Plaintiff called as a witness the owner of the filling station, one McKinney, who testified that he told plaintiff to paint the car, and not to use it for his own personal use, but to take it directly to his home, where the work was to be done, and bring it back on the following Monday. The accident occurred, according to plaintiff's testimony, on Sunday while plaintiff was taking his wife to her mother's home. Plaintiff had a collision with a train. The Supreme Court held that as a matter of substantive insurance law, the clause in the policy should not be extended beyond its plain meaning. Since McKinney was called as a witness for the plaintiff, and since his testimony was clear that no permission existed, the Supreme Court held that plaintiff was bound by McKinney's testimony. Plaintiff was free to introduce any evidence he might have to prove the facts were other than as McKinney testified, but plaintiff failed to introduce any controverting testimony.

The conclusion of the Supreme Court that on the record as viewed from the substantive insurance law as laid down by the Court, plaintiff failed to discharge his burden of producing evidence that he was occupying the car with the permission of the insured, is undoubtedly sound. It is doubtful whether anything helpful is added by stating that "plaintiff is bound by the testimony of his own witness." Such statements, as the Court points out, have caused confusion in the area of their most common applicability, the right of a party to impeach his own witness.[72]

71. 238 S. C. 217, 119 S. E. 2d 746 (1961).
72. Where the party himself testifies on the trial, is his testimony conclusive against himself? Dean McCormick's discussion of this problem is illuminating, MCCORMICK ON EVIDENCE, § 243 (1954). The instant case, where a witness for the party testifies, does not involve the same problem; such testimony could hardly be called a formal admission by the party.